

FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

In Reply Refer to:
1800B3-TSN

June 17, 2002

Cove Road Publishing, LLC
c/o J. Dominic Monahan, Esq.
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777 High Street
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Re: KFEG(FM), Klamath Falls, Oregon
Facility ID No.: 77829
File No. BLH-20010102AAL
Application for License

Dear Applicant:

We have before us the application of Cove Road Publishing, LLC (“Cove Road”)¹ for license to cover the construction permit of FM broadcast station KFEG, Klamath Falls, Oregon (“Application”).² We also have the following pleadings relating to the Application: (1) a “Petition for Sanctions Against Klamath Basin Broadcasting for Violation of Part 73.1620(a)(1)” (“Petition for Sanctions”), filed by George Smith (“Smith”) November 28, 2000; (2) a Petition to Deny, filed by Sandra Soho (“Soho”) February 16, 2001; and (3) an Informal Objection, filed by Leroy Demery (“Demery”) February 21, 2001. Cove Road filed an Opposition to Petition to Deny, also addressing Smith’s Petition for Sanctions, on May 14, 2001.

¹ We originally granted the construction permit for KFEG to Klamath Basin Broadcasting (“KBB”), a general partnership of William Ifft and David Quinlan. In December, 2000, KBB filed an application for assignment of permit, File No. BAPH-20001220ABQ, to effectuate the pro forma transfer of the KFEG construction permit from KBB to Cove Road, a limited liability company formed by KBB’s partners. Following Commission approval, the pro forma transfer of the construction permit was consummated on March 1, 2001. Cove Road is thus KBB’s successor in interest. We shall refer to the applicant as “Cove Road” in this letter.

² File No. BLH-20010102AAL.

As discussed below, we find that the various pleadings do not raise a substantial and material question of fact as to Cove Road's qualifications to be a Commission licensee, and that grant of the Application would be in the public interest, convenience, and necessity. Accordingly, we grant the Application.

Discussion. *Allegations of Interference:* Soho filed a Petition to Deny, alleging among other things that KFEG is causing interference to KBUG(FM), Malin, Oregon.³ Additionally, the Klamath Falls airport received several aviator reports of interference that it believed may have been attributable to KFEG. These reports were forwarded to the Commission via the local office of the Federal Aviation Administration ("FAA").

Section 309 of the Communications Act establishes a two-step process to determine whether a hearing is required: (1) a petition to deny must contain specific allegations of fact that, taken as true, make out a *prima facie* case that grant of an application would not serve the public interest; and (2) the allegations, taken together with any opposing evidence before the Commission, must raise a substantial and material question of fact as to whether grant of the applications would serve the public interest. *See Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998); *see also Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). The first step of our inquiry "is much like that performed by a trial judge considering a motion for a directed verdict: if all the supporting facts alleged in the affidavits were true, could a reasonable factfinder conclude that the ultimate fact in dispute has been established." *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987). "Allegations within these documents that consist of ultimate, conclusionary facts or more general allegations on information and belief, supported by general affidavits . . . are not sufficient." *North Idaho Broadcasting Company*, 8 FCC Rcd 1637, 1638 (1993), citing *Gencom Inc.*, 832 F.2d at 180, n.11.

"At the second step, a substantial and material question is raised when 'the totality of the evidence arouses a sufficient doubt on the question whether grant of the application would serve the public interest that further inquiry is called for.'" *Serafyn*, 149 F.3d at 1216, citing *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985). "Should the Commission conclude that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it must conduct a hearing in accordance with 47 U.S.C. § 309(d)(2)." *North Idaho Broadcasting*, 8 FCC Rcd at 1638.

Soho claims that KFEG is causing interference to KBUG's signal, and that this is the reason KBUG can no longer be heard in Klamath Falls.⁴ Cove Road attacks Soho's engineering showing, contending that it provides no information as to how Soho's engineer arrived at the conclusion that KFEG caused the alleged interference to KBUG. Cove Road also claims that KBUG's alleged service losses were caused by that station's temporary reduction in power and antenna height above average terrain.⁵

³ We address the other allegations of Soho's Petition to Deny below.

⁴ Petition to Deny, ¶¶ 1-2.

⁵ Opposition to Petition to Deny, pp. 3-4 and Exhibit 1.

We find there is no substantial and material question of fact as to interference from KFEG to KBUG. The engineering showing supporting Soho's allegation of interference consists of a conclusory statement in a letter from Smith that "KFEG . . . is producing interference on 100.5 MHz. The signal that KFEG produces on 100.5 MHz is only attenuated by 41 dB, which is in violation (sic) of section 73.317(d) of the FCC regulations. (sic)."⁶ There is no showing as to the engineer's qualifications or his methodology in measuring the alleged spurious signal on 100.5 MHz. Without a more detailed engineering showing, we cannot find a substantial and material question of fact warranting further inquiry. See *North Idaho Broadcasting Company, supra*.

Complaints were also received by the FAA office in Klamath Falls, alleging that the operations of KFEG cause interference to aeronautical operations on 118.5 MHz and affecting communications between aircraft and the Klamath Falls airport. As explained below, we find no evidence that KFEG is the source of the reported interference.

The complaints of interference were forwarded by the local FAA office over a period of months to Mr. Binh Nguyen, the FCC's Resident Agent at Portland, Oregon, who in turn forwarded copies to the FCC in Washington for analysis. These complaints consist of approximately 30 very short reports, from airborne aircraft, of interruption to communications. In those complaints that describe the interference, it is characterized as static or loss of signal received from the airport tower on 118.5 MHz. None of the aircraft reports identify KFEG as the source of the interference, and the reports do not reveal any consistent location affected by interference.

Construction permit condition. The construction permit for KFEG contained a condition requiring the station to conduct spurious emissions tests to demonstrate compliance with 47 C.F.R. Section 73.318. These tests were performed on October 11, 2000, by Boyd Broadcast Technical Services. Fundamental and likely harmonic frequencies were checked, and the report indicates that all harmonic emissions were at least 80 dB below the carrier reference frequency, in compliance with the rule. The results of Boyd's testing demonstrate that Cove Road has met the condition in its construction permit.

Additional spurious emissions tests. After the staff learned of the complaints being received by Mr. Nguyen, we sent a letter to KFEG dated May 10, 2001, asking Cove Road to conduct additional spurious emissions tests, as it appeared possible that the new operation of KFEG was a potential source of the interference.⁷ We asked KFEG to pay particular attention to any emissions that might be occurring on 118.5 MHz, the frequency on which the interference was reported, and required that the testing be coordinated with KKRB, Klamath Falls, Oregon.⁸ Testing was performed on June 20, 2001, by Boyd Broadcast Technical Services, with separate

⁶ Letter from George Smith, Staff Engineer, Pacific Radio Engineering, to Rev. Sandra Soho, Radio Station KBUG (February 2, 2001), attached to Petition to Deny.

⁷ Letter to Mr. J. Dominic Monahan and Klamath Basin Broadcasting from Edward P. De La Hunt, Assistant Chief, Audio Services Division, Mass Media Bureau (May 10, 2001).

⁸ KKRB and KFEG share an antenna on the same tower.

measurements being made at the transmitter site and at the parking lot of the Klamath Falls airport. From his measurements at the KFEG/KKRB transmitter site, Mr. Boyd determined that if there was any emission on 118.5 MHz, it was at least 104 dB below the carrier level. This level is well in excess of the 80 dB required by 47 C.F.R. Section 73.317. At Klamath Falls airport, Mr. Boyd listened to the 118.5 MHz airport tower frequency and did not notice any interference on that frequency.

Third set of spurious emissions measurements. On March 4, 2002, the FCC's Resident Agent, Mr. Binh Nguyen, traveled to Klamath Falls to investigate the matter of radio interference to aircraft radios allegedly caused by KFEG. Mr. Nguyen observed while Mr. Boyd conducted a new round of spectrum analyzer measurements at the KFEG transmitter site. The measurements showed that the KFEG emissions level on 118.5 MHz at the transmitter site was 99.5 dB below the carrier reference. Mr. Nguyen concluded that KFEG was operating in compliance with 47 C.F.R. Section 73.317. Mr. Nguyen also monitored the frequency 118.5 MHz using the FCC's equipment, and did not hear any interference on that frequency.

On March 5, 2002, Mr. Nguyen met with Mr. Bill Hancock, the Klamath Falls Airport Manager, and FAA technicians Richard Voss and Krysten Gage. Mr. Hancock suggested monitoring 118.5 MHz at Radio Hill (also called KAGO Hill, site elevation approximately 4500 feet AMSL). Mr. Nguyen accompanied the technicians to this site, and detected no interference on 118.5 MHz using Commission equipment. Similarly, Mr. Voss could not hear any interference on 118.5 MHz on his handheld FAA receiver. Ms. Gage observed the signal display unit in the Commission's vehicle and monitored an ICOM receiver installed outside the vehicle, and concurred that there was no interference on 118.5 MHz. Ms. Gage also contacted the airport tower via cellular phone: the tower confirmed that there was no interference on 118.5 MHz. Based on these results, Mr. Nguyen reported to the Audio Division staff that KFEG complies with the spurious emissions requirements of 47 C.F.R. Section 73.317, and that no interference was detected on 118.5 MHz.

As of this time, we have no evidence connecting KFEG to any interference complaints on 100.5 MHz or 118.5 MHz. Soho's evidence of interference to KBUG is conclusory, and does not suffice to make out a *prima facie* case that KFEG is operating in violation of our technical rules. As to alleged interference with airport tower transmissions on 118.5 MHz, three sets of spurious emissions measurements indicated that KFEG is operating well within the requirements of 47 C.F.R. Section 73.317. Staff examination of the complaints received turns up no reports of broadcast audio being received either by pilots or tower. The allegation that KFEG is the source of the reported interference appears to be no more than conjecture. In the absence of any persuasive evidence, we conclude that KFEG is operating in compliance with the FCC's rules, and that the station is not the source of any harmful interference.

Real Party in Interest / Fraudulent Application: In addition to her allegations of interference, Soho makes two further allegations against Cove Road: (1) that Bob Wynne is the real party in interest in KFEG; and (2) that Cove Road is a partner in an allegedly fraudulent application for a noncommercial educational station at Bend, Oregon.

We find no substantial and material question of fact raised by these allegations. As to the first, Soho's evidence consists only of bare, unauthenticated, conclusory statements that Bob Wynne and Wynne Broadcasting ("WB") handle the day-to-day operation of KFEG, that WB's sales staff handles KFEG's sales, that KFEG's studio is "located in the Wynne Broadcasting studio" and KFEG's transmitter is co-located with WB's station KKRB(FM), and that Bob Wynne "openly brags that he is the owner of radio station KFEG and Klamath Basin Broadcasting is purely a front to deceive the Commission."⁹ No declarations or other evidence are attached to back up these statements. The record thus lacks sufficient evidence to raise a substantial and material question of fact as to Soho's real party in interest allegation. *See, e.g., North Idaho Broadcasting Company, supra*, 8 FCC Rcd at 1638.

As to the allegation of a fraudulent application for Bend, Oregon, Soho's sole evidence consists of her assertion that there is a "fake construction permit application" for a new NCE station at Bend,¹⁰ and that "[i]t appears that Klamath Basin Broadcasting is a partner in this fake application."¹¹ Again, such a vague and conclusory statement is insufficient to raise a substantial and material question of fact. We therefore deny Soho's Petition to Deny.¹²

Petition for Sanctions: George Smith filed a Petition for Sanctions, claiming that he heard broadcasts by KFEG beginning July 17, 2000, but that Cove Road did not file its license application within ten days of commencing program tests, as required by 47 C.F.R. § 73.1620(a)(1).¹³ Cove Road does not address these allegations, but admits in its Opposition to Petition to Deny that it commenced KFEG program tests July 14, 2000.¹⁴ Cove Road did not file its Application until January 2, 2001, over five months later.

Smith is correct that Cove Road was technically in violation of Section 73.1620(a)(1) during an approximately five-month period between July, 2000, and January, 2001. As a general matter, failing timely to file a license application will result in significant sanctions, such as monetary forfeitures, when there are other serious violations as well. *See, e.g., M.C. Allen Productions*, 16 FCC Rcd 9505 (Enf. Bur. 2001) (operation at unauthorized locations and frequency, main studio violation); *Rasa Communications Corp.*, 11 FCC Rcd 13243 (Mass Media Bur. 1996) (unauthorized transfer of control, facilities operating at variance with construction permit); *Triad Broadcasting Co., Inc.*, 96 FCC 2d 1235 (1984) (failure to provide

⁹ Petition to Deny, ¶¶ 3, 5 (there is no paragraph 4 in the Petition to Deny).

¹⁰ File No. BPED-19981127MD.

¹¹ Petition to Deny, ¶ 6.

¹² Cove Road notes in its Opposition that a prior challenge to its qualifications, based on the same allegations of real party in interest and fraudulent application, was denied in September, 2000. *Letter to Ms. Sandra Falk and Klamath Basin Broadcasting from Linda Blair, Chief, Audio Services Division, Mass Media Bureau*, Ref. No. 1800B3-TSN (September 29, 2000). Soho's Petition to Deny is based on less of an evidentiary showing than Sandra Falk's prior petition, and thus there is even less reason to grant the Soho petition.

¹³ Petition for Sanctions, ¶¶ 2, 4, and attached Declaration of George Smith, ¶¶ 1-2.

¹⁴ Opposition to Petition to Deny, p. 4.

required technical information, operating after program test authority revoked). That is not the case here. We have already determined, above, that Cove Road is operating KFEG in technical compliance with its permit. Smith does not allege any violations other than Cove Road's failure timely to file its Application. We therefore ADMONISH Cove Road for failing to file its license application within ten days of commencing program tests. However, we find that this violation, without more, does not justify additional sanctions against Cove Road.

Allegations of Equal Employment Opportunity Violations: Demery filed an Informal Objection to the Application February 21, 2001. He alleges that KFEG was operated by Wynne Broadcasting, that he went to the Wynne Broadcasting studio where KFEG was being operated, that he learned KFEG was hiring, but that when he asked the receptionist for an application an individual, identified only as "Mr. Allen," informed the receptionist, in Mr. Demery's presence, that the station did not hire African-Americans.¹⁵ Demery charges that Wynne Broadcasting and Cove Road are in violation of "the federal Equal Employment Opportunity rules."¹⁶

When allegations of employment discrimination are raised, the Commission refers such matters to the Equal Employment Opportunity Commission ("EEOC"), as Congress intended that agency to be principally responsible for resolving such complaints. *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 FCC 2d 2320 (1978). See also *Pacific and Southern Company, Inc.*, 11 FCC Rcd 8503, 8505 (1996) ("*Pacific and Southern*"). While we are not precluded from investigating such allegations where the underlying facts raise questions about an applicant's basic qualifications, we find that Demery alleges "an individual complaint of employment discrimination that, pursuant to Commission policy, is appropriately resolved in the first instance by the EEOC." *Pacific and Southern*, 11 FCC Rcd at 8505-06. Mr. Demery has not raised facts that would warrant a departure from our general policy as stated in *Pacific and Southern*. Accordingly, we will refer Mr. Demery's Informal Objection to EEOC for disposition, and deny it to the extent that it seeks denial of the Application. We will, however, take cognizance of any final determination regarding employment discrimination made by EEOC or any other entity of competent jurisdiction.

Conclusion. For the foregoing reasons, we find that no substantial and material question of fact has been raised warranting further inquiry into the various allegations brought against Cove Road and KFEG. We further find Cove Road basically qualified to be a Commission licensee, and that grant of the Application would serve the public interest, convenience, and necessity.

Accordingly, the Application for License filed by Cove Road Publishing, LLC, File No. BLH-20010102AAL, IS GRANTED. Cove Road IS HEREBY ADMONISHED for failing to file the license application for KFEG(FM) within the time period set forth in 47 C.F.R. § 73.1620(a)(1), and the "Petition for Sanctions Against Klamath Basin Broadcasting for Violation

¹⁵ Informal Objection, first and second unnumbered pages. According to Mr. Demery, the individual who spoke to the receptionist actually utilized a well-known derogatory term for African-Americans.

¹⁶ Informal Objection, second unnumbered page.

of Part 73.1620(a)(1)” filed by George Smith IS GRANTED to the extent that we have admonished Cove Road for said violation. The Petition to Deny filed by Sandra Soho IS DENIED. The Informal Objection filed by Leroy Demery IS REFERRED TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. The Commission will request the EEOC to inform it of the results of the case proceeding.

Sincerely,

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